No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

Appellee.

PETITION OF APPELLANT FOR REHEARING.

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TABLE OF AUTHORITIES CITED

Cases

Statutes

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit:

Comes now your petitioner Glens Falls Indemnity Company, appellant-defendant, and respectfully petitions for rehearing in the above entitled case, in which the opinion was filed on the 3rd day of February, 1948, and as grounds for rehearing assigns the following:

I.

This Honorable Court has pointed out that certain ambiguities exist between Article XVI, Article XI and Article XXI, Subdivision 3, of the subcontract.

The Court has interpreted the subcontract in favor of the prime contractor apparently completely overlooking the fact, which is uncontradicted in the record, that the subcontract was drawn by an officer of appellee corpora-

tion. Such an interpretation ignores the universal rule recognized by the law of the State of California and all of the Circuits of the United States Circuit Court of Appeals, from which we have been able to obtain direct quotations, to the effect that any uncertainty or ambiguity in a contract shall be construed directly against the party drawing the contract, which party had the opportunity to use any of the words in the English language to express itself.

In support of this proposition we respectfully refer the Court to the case of *Northern Pac. Ry. Co. v. Twohy Bros. Co.* (Ninth Circuit), 95 F. (2d) 220, wherein the Honorable William Denman, writing the opinion, said:

> "However, were the term 'work' still ambiguous as to its interpretation, we are required to interpret it against the railway, since it prepared the contract headed 'Form 109-A General Contract' which the contractor signed."

Civil Code of California, Section 1654, provides:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

In the case of *Taylor v. J. B. Hill Co.* (1948), 31 A. C. 382, the court said:

> "It is a settled rule that in case of uncertainty in a contract it is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument."

If the decision of this Court is to be taken as adopting a rule contrary to the rule just expressed, your petitioner desires to point out that such a rule would be out of harmony with the following cases in the following circuits:

Second Circuit:

In the case of *Van Zandt v. Hanover National Bank,* 149 Fed. 127, the court in construing a contract which permitted of two interpretations, reversed the judgment of the District Court in favor of defendant who prepared the contract. The court said, in part:

> "Such instruments are always to be construed most strictly against the party by whom they have been prepared."

In the case of *Star Chronicle Pub. Co. v. New York Evening Post, Inc., et al.,* 256 Fed. 435, at 441, the court said:

> "Where a contract is ambiguous, it will be construed most strongly against the party employing the words concerning which doubt arises. * * * The law holds a man responsible for ambiguities in his own expressions and he has no right to induce another to contract with him on the supposition that his words mean one thing, hoping that the Court may make them mean another thing."

Third Circuit:

> "The trial judge could properly have been influenced by the rule of construction that, if a provision in a written contract is of doubtful meaning, the doubt is to be resolved against the party which drafted the agreement."
>
> *Metropolitan Casualty Ins. Co. of New York v. Banks,* 76 F. (2d) 68.

Fourth Circuit:

"The contract was drawn by defendant, and ambiguities must be resolved against it."

Castner Curran & Bullett, Inc. v. Sudduth Coal Co., 282 Fed. 602, at 603-604.

"The contract was drawn by Southern. It was signed, as so drawn, by Coca Cola without the change of a word. When the words of a contract are ambiguous, it is a well known and worthy maxim of our law that such ambiguities should be resolved against the party that drew the contract and selected its terminology and nomenclature."

Southern Ry. Co. v. Coca Cola Bottling Co., 145 F. (2d) 304, at 307.

Fifth Circuit:

In the case of *Coche, et al. v. Vacuum Oil Co., et al.*, 63 F. (2d) 406, at 409, the court quotes with approval:

"'* * * Where words or other manifestations of intention bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed.' (Contract-restatement Sec. 236.)"

Eighth Circuit:

"The language of a contract will be construed most strongly against the party preparing it."

E. I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., 64 F. (2d) 224.

To the same effect:

Queen Ins. Co. of America v. Meyer Milling Co., 43 F. (2d) 885.

"It must also be kept in mind that, when a written contract is entirely prepared by one of the parties, and accepted as thus prepared by the other, any doubt as to the meaning of its provisions is to be resolved against the party preparing it."

Drainage Dist. No. 1 of Lincoln County, Neb., et al. v. Rurle, et al., 21 F. (2d) 257, at 261.

To same effect:

Gulf Refining Co., et al. v. Home Indemnity Co. of New York, 78 F. (2d) 842, at 844.

Tenth Circuit:

"* * * and even if we assume the instrument to be ambiguous in this respect, the rule applies that the doubt be resolved against the party who drew it."

Continental Oil Co., et al. v. Fisher Oil Co., 55 F. (2d) 14, at 16.

"The conflict, if any there be, between the provisions of Article four and Article three was introduced into the contract by the changes suggested by the construction company. The language, therefore, under Sec. 9478, *supra,* must be interpreted most strongly against the construction company which caused the uncertainty to exist."

Cities Service Gas Co. v. Kelly Dempsey & Co., Inc., 111 F. (2d) 247, at 249.

II.

In its opinion, the Court said:

"We are convinced appellee was diligent in meeting the conditions required of it by the bond."

The Court in arriving at this conclusion takes the following steps which overlook uncontradicted evidence which

This holding of the Court overlooked the undisputed evidence that no material was produced until about February 25th, and the evidence contained in the letter of Nick L. Basich, president of appellee, dated April 5th, 1945, in which appellee referred to the subcontract dated February 7, 1945, and stated that:

> "* * * to date you have not averaged 800 cubic yards of material per plant per day"

and further stated that the subcontractor did not start producing materials on the 19th of February, 1945.

The Court also overlooked the uncontradicted statement contained in the letter of appellee dated April 27, 1945, in which appellee stated that the subcontractor had produced less than 50% of the amount required by the subcontract.

Step No. 4. The Court said in its opinion:

> "The contract does not specify the nature of the work that was to commence on February 19."

The purpose of the contract was the production of material, and the parties understood that *commencement of work* and *production of material* meant one and the same thing.

The Court overlooked the letter which appellee addressed to the subcontractor April 5, 1945, which uses the terms "crushing material" and "commence work" as synonymous in the following words:

> "Reference is made to our contract agreement, dated February 7, 1945, in which you agreed to commence crushing material with one plant on February 19, 1945 * * *

> * * * your attention is directed to the fact that the plant did not commence work on February 19th; * * *."

The Court also overlooked the language of the subcontract which states that the general contract

> "* * * includes the following described work to be done under this agreement:
>
> Item 9 Gravel embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and sand for 18"-12"-18" Portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement concrete airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2."

The subcontract also states in Article II that:

> "The work shall be commenced not later than February 19, 1945, * * *."

California Civil Code, Section 1648, provides:

> *"Contract restricted to its evident object.* However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

In the case of *Northern Pac. Railway Co. v. Twohy Bros. Co.*, 95 F. (2d) 220, this court said in part:

> "However, were the term 'work' still ambiguous as to its interpretation, we are required to interpret it against the railway, since it prepared the contract headed 'Form 109-A General Contract' which the contractor signed."

Step No. 5. In its opinion the Court said:

> "The finding of the District Court that appellant had received sufficient and timely notice of the defaults of Duque and Frazzini finds ample support in the evidence."

We believe the Court completely overlooked that there is no evidence whatever in the record to show that any notice was ever given as required by Paragraph First of the surety bond. The first intimation to appellant surety of any default on the part of the subcontractor was the letter of April 5, 1945, which appellee contended had only one purpose—that of forcing the subcontractor to install additional equipment.

Step No. 6. The Court overlooked the condition precedent set out in Paragraph Second of the bond, that the obligee must perform all of the terms, covenants and conditions of the subcontract on its part to be performed.

The uncontradicted evidence shows that obligee did not perform the provisions of Article XVI of the subcontract. Proof of appellee's failure to comply with this condition precedent is shown in plaintiff's complaint and in its bill of particulars, which show that plaintiff not only paid 90% according to Article XVI of the subcontract, but paid up to June 8, 1945, $36,456.41 in excess of the gross earnings under the subcontract.

III.

In holding that the subcontract was not altered, except in changes in the specifications regarding the method of measuring material and in the size of rock, and that such changes were of small significance and in no way affected the risk of the surety, the Court has overlooked the law applicable to the rights of a surety when the contract has

been in any respect altered without its consent, and has overlooked undisputed evidence regarding the following material alterations of the contract:

1. The uncontradicted evidence shows that the general superintendent of appellee supervised work in the pit relative to the necessary production of material; that he countermanded orders of the subcontractor on May 19, and the subcontract employees continued work on his orders and against the orders of Frazzini; that Basich entered into a contract, without the consent of Duque and Frazzini, to move into the pit for subcontract work a machine at a cost of $2500.00; that all employees were carried on the payroll of appellee as its own employees; that appellee set the wages for the subcontract employees in violation of the prime contract, which provides:

> "The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less or more than those stated in the specifications (subject to Executive Order No. 9250 and the General Orders and Regulations issued thereunder) regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; * * *."

2. In holding that appellee did not make premature payments to or for the subcontractor, the Court overlooked the requirement of the subcontract which was drawn by

appellee, particularly Article XVI thereof which provides that partial payments by appellee to the subcontractor

> "* * * will be made by the Contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile,"

and overlooked paragraph XVI of plaintiff's complaint which alleges that appellee not only paid all of the amounts earned by the subcontractor, but in addition thereto paid $36,456.41 prior to June 8, and has overlooked the fact that these payments were made by reason of an alteration in the subcontract "following the execution" of the subcontract. [Tr. p. 128.]

3. In holding that the change in the method of measuring material and the method of paying therefor was of small significance, we think the Court overlooked the fact that the change in the subcontract which required that the material, Item 11, be measured on truck-water level to the measurement of square yards as shown in plaintiff's bill of particulars [Tr. p. 80], was a complete change in the method of measurement of material and the method of payment, the results of which are impossible to calculate, and which created an ambiguity and uncertainty in the contract which did not exist theretofore. The cost of performance may thereby have been materially increased, but due to the nature of the change such result is not possible to calculate.

In *United States v. McIntyre,* 111 Fed. 590, the court said in part:

> "I think it fundamental that any change in the contract without his consent, will operate his discharge. The Surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon

the continuance of that particular contract. As stated by a distinguished judge: 'He who would charge a Surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however ironbound it may be; for there is for the Surety in the enforcement of his bond, no equity nor latitude beyond its strict terms.'"

IV.

It is apparent that the Court has overlooked consideration of, or has misapprehended the following undisputed evidence which makes the testimony of appellee's witness George J. Popovich wholly inadmissible:

After Popovich was sworn as a witness the following occurred:

"Q. Referring to your bill of particulars, Mr. Popovich, which was introduced in evidence, Schedule I, Payroll—Duque & Frazzini, from February 11, 1945 to June 9, 1945, showing a total of $38,979.65, subject to the corrections made this morning, will you state from what data or information that item was prepared? A. The items were prepared from weekly payrolls submitted by Duque & Frazzini.

Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence.

The Court: In the Federal Court, if the payrolls are available, a person who had charge of them can summarize.

Mr. Monteleone: We have the originals; if Mr. McCall desires the originals, they are in court.

The Court: So long as the originals are available for inspection, it is not necessary to produce them.

Mr. Monteleone: They have been inspected by the auditor for the defendant on many occasions.

The Court: I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel. That is the Federal rule, and has been for many years."

On cross-examination witness Popovich testified:

"Q. I believe you said, in connection with Schedule I, that the information which you used to make up that schedule was taken from payroll sheets which you have in court? A. Yes.

Q. Do you have those before you? A. Yes, we do.

Q. How many payroll sheets do you have making up Schedule I? A. We have all payroll sheets from the beginning of the job, January 29th to October 13, 1945."

After many evasive answers, the witness finally admitted he did not have any of the payroll sheets in court.

"The Court: Counsel wants to know if you have any weekly sheet.

Mr. Monteleone: No, I don't think we have."

It is thus seen that the condition on which the court allowed the witness to testify was not complied with, but appellee falsely stated it had the records in court.

Witness Vernon who checked the records for appellant testified that there was no line of demarcation whatsoever between checks which were alleged to have been paid for the account of the subcontractor and checks for work and material on the prime contract, and that the name of Duque and Frazzini did not appear on any invoice or check exhibited to him covering items charged to Duque and Frazzini, which testimony was not denied.

We submit that appellant was prejudiced by being denied proof on which appellee's claim was based.

V.

In holding that the amount of damages claimed by appellee was definite and fixed and at all times available to appellant, the Court has overlooked the following undisputed evidence, and that the claim was based upon reasonable value. The effect is to materially prejudice appellant by charging it with interest prior to judgment contrary to accepted legal concepts regarding recovery of interest.

1. Appellee's complaint alleged reasonable value, and at the trial appellee endeavored to prove by witness Popovich the reasonable value of each and every schedule in the bill of particulars;

2. Appellant received no information regarding amounts until after the suit was filed when it demanded a bill of particulars;

3. The verified complaint demands one amount, the verified bill of particulars shows another amount, and on the date of the trial appellee admitted that it had wrongly charged items amounting to hundreds of dollars which it requested be deducted; that after deducting all these amounts the judgment, without interest, was in an amount greater than prayed for in the complaint; the Court further overlooked the fact that plaintiff's bill of particulars contained an item of $611.09 for public liability and property damage insurance which is alleged to be for the subcontractor. Appellee refused to allow appellant to examine the policy until several demands were made and the Court ordered appellee to produce the pol-

icy, and when the policy was produced appellee admitted that it did not cover the subcontractor.

4. In holding that,

> "* * * the reasonableness of the charges incurred had never been disputed."

the Court overlooked the undisputed record at pages 125 to 128 of the transcript which shows that many items were in dispute and errors admitted by appellee.

In the case of *Hood, et al. v. Verdugo Lumber Co.,* 127 Cal. App. 133, 15 P. (2d) 542, the court said:

> "Appellants contend that interest should not have been allowed on the amounts found due to the defendant lumber companies, as in their cross-complaint they sought the reasonable value of the building materials furnished. In findings X and XIV the court determines the reasonable value of the building materials furnished to be $1,852.39 as to the Verdugo Lumber Company and $3,938.39 as to Emil F. Swanson, doing business under the fictitious firm name and style of Eagle Rock Lumber Company. In view of these findings we feel interest could not be allowed prior to the rendition of judgment."

In the case of *Indemnity Ins. Co. of North America v. Watson, et al.,* 128 Cal. App. 10, 16 P. (2d) 760, the court said:

> "Having in mind the theory upon which the case was tried and the fact that with respect to certain items contained in the schedule of charges appearing in the complaint, the amounts of such items were in dispute, and the proof produced at the trial showed such amounts as alleged to be in excess of the amounts

properly due, we have arrived at the conclusion that the court was justified in refusing to advise the jury that it might make an allowance for interest."

Wherefore, appellant prays for a rehearing and for reversal of the cause.

Respectfully submitted,

JOHN E. MCCALL,
Attorney for Petitioner.

Certificate of Counsel.

I, the undersigned, John E. McCall, attorney for petitioner herein, hereby certify that in my judgment and opinion the foregoing petition for a rehearing is well founded, and that it is not interposed for purpose of delay.

JOHN E. MCCALL.